

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 60041-9-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
DOUGLAS EDWARD GALLAGHER,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 1, 2009
_____)	

Leach, J. — A jury found Douglas Gallagher guilty of first degree robbery (two counts), first degree burglary, first degree unlawful possession of a firearm, and second degree taking of a motor vehicle without permission. We reject his challenges to evidentiary rulings, the imposition of multiple firearm sentence enhancements, and the sentencing court's persistent offender determination. The contentions in Gallagher's statement of additional grounds for review are without merit. Accordingly, we affirm.

FACTS

Allan Cox and Douglas Gallagher attended a meeting in the Green Lake area on the evening of March 5, 2004. Gallagher left the meeting early, and Cox later discovered that his Subaru was missing from the parking lot. Cox reported the theft to the police.

At about 7:30 a.m. the following morning, a Seattle police officer spotted Cox's stolen Subaru driving near Green Lake and eventually pulled it over. The driver got out and fled. The officer chased the man but eventually lost him. The officer later identified Gallagher as the driver. Cox found some of Gallagher's clothing in the car when it was returned.

At 9:00 a.m., Valentina Lugacheva awoke in her Green Lake area home to find a man standing in her bedroom. The man, who was wearing rubber gloves, pointed a gun at Lugacheva and demanded drugs, money, jewelry, and guns. The man eventually brushed his teeth, shaved, and changed into clothing belonging to Lugacheva's husband. After Lugacheva gave him something to eat, the man left the house, taking three handguns, ammunition, and several items of clothing. The man threatened to kill Lugacheva if she called the police. Lugacheva identified Gallagher as the intruder, and Gallagher's DNA (deoxyribonucleic acid) was recovered from a toothbrush and the rubber gloves he left behind.

A short time later, Colleen Rhay was sitting in her car outside her house near Green Lake when a man approached, pointed a gun at her, and ordered her to get out. The man then drove off with Rhay's car. Rhay immediately ran to the house next door, where her husband, Dave Stone, lived. Stone called 911 and relayed information between the operator and Rhay for a few minutes until Rhay calmed down and took the phone.

Rhay did not get a good look at the man because he was wearing a baseball cap and large sunglasses. She was unable to identify Gallagher. Rhay noticed that the carjacker had a distinctive scar. She initially described the scar as being on the

man's face, but at trial, she stated that she would have been in a position to have seen the distinctive scar on the left side of Gallagher's neck.

At about 8:00 p.m., police investigated a crash involving Rhay's stolen car in Lake City. Witnesses saw a man get out of the car and run away. A police canine unit tracked the man to a nearby parking lot, where officers arrested Gallagher after a struggle. During the chase, Gallagher dropped one of the guns taken from Lugacheva's house, and he was wearing several items of clothing stolen from Lugacheva's husband when arrested. Police also recovered other items taken from Lugacheva in the stolen car.

The State charged Gallagher with one count of first degree burglary, two counts of first degree robbery, and two counts of first degree assault, all with a firearm enhancement, and one count of first degree unlawful possession of a firearm and one count of second degree taking a motor vehicle without permission. The jury found him guilty of all counts as charged. The sentencing court vacated the two assault convictions, concluding that they merged into the two robbery counts. Based on the current robbery and burglary convictions and multiple prior "most serious offenses,"¹ the court sentenced Gallagher to life without the possibility of parole under the Persistent Offender Accountability Act (POAA).²

DECISION

Gallagher contends that the trial court violated his constitutional right to confrontation by admitting the portion of a 911 recording in which Dave Stone spoke

¹ RCW 9.94A.030(32).

² See RCW 9.94A.570, 9.94A.030(37).

briefly with the operator while his wife was still too upset to talk. Stone did not testify at trial, and the trial court ruled the evidence was admissible as a present sense impression.³ Gallagher argues that the statements were testimonial hearsay and that because Stone did not testify at trial, the evidence was admitted in violation of Crawford v. Washington⁴ and Davis v. Washington.⁵ Evidentiary rulings generally fall within the trial court's discretion, but we review a confrontation clause challenge de novo.⁶

The Sixth Amendment to the United States Constitution bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination.⁷ The United States Supreme Court has declined to offer a comprehensive definition of "testimonial," but in Davis, the Court refined the definition in concluding that a 911 caller's statements were not testimonial because they were made primarily to assist the police in responding to an ongoing emergency:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal

³ See ER 803(a)(1).

⁴ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

⁵ 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

⁶ State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007), cert. denied, ___ U.S. ___, 128 S. Ct. 2430, 171 L. Ed. 2d 235 (2008), overruled on other grounds by Giles v. California, ___ U.S. ___, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008). Gallagher's confrontation challenge may be raised for the first time on appeal. See RAP 2.5(a)(3); State v. Kronich, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

⁷ Crawford, 541 U.S. at 53-54.

prosecution.^[8]

Our Supreme Court has identified four factors relevant to determining the primary purpose of an interrogation: “(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation.”⁹

Rhay contacted Stone immediately after a man had pointed a gun at her, ordered her out of her car, and then drove off. Stone’s call to 911 occurred within minutes of the carjacking, while Rhay was still too upset to talk to the 911 operator. Contrary to Gallagher’s assertion, the circumstances constituted an emergency, even though the armed assailant had apparently driven off and Rhay was unhurt. The information that Stone relayed, including the location of the incident, a description of Rhay’s car, the direction that the assailant drove, and his race, was essential to permit the police to assess the nature of any ongoing danger to Rhay and the community and to plan the appropriate response.¹⁰ Finally, the nature of the questioning was relatively informal, given the fact that Stone was not a witness and was essentially relaying the basic information required at the beginning of the 911 call.

The foregoing circumstances establish that the primary purpose of the 911 operator’s questions to Stone was to enable police assistance to meet an ongoing emergency.¹¹ The admission of Stone’s statements did not violate Gallagher’s right

⁸ Davis, 547 U.S. at 822.

⁹ State v. Ohlson, 162 Wn.2d 1, 12, 168 P.3d 1273 (2007).

¹⁰ Ohlson, 162 Wn.2d at 18.

¹¹ See Ohlson, 162 Wn.2d at 18-19.

to confrontation.

But even if the trial court erroneously admitted Stone's statements, the error was harmless. Violations of the confrontation clause are harmless if there is "[overwhelming] untainted evidence" that necessarily leads to a finding of guilty.¹² Stone was not a witness to the carjacking and did little more than relay information between Rhay and the 911 operator. His statements provided no evidence identifying Gallagher as the carjacker. After a short time, Stone handed the telephone to Rhay, who then repeated the information that Stone had relayed and provided the operator with a more detailed account of the incident. That portion of the 911 tape was also admitted and is not challenged on appeal. Rhay also testified at trial. Under the circumstances, Stone's statements could not conceivably have had any effect on the outcome of the trial. The untainted evidence necessarily leads to a finding of guilt beyond a reasonable doubt.¹³

Gallagher asserts that multiple firearm enhancements for the first degree burglary and first degree robbery counts violated double jeopardy because the underlying offenses also included possession or use of a firearm as an element. He also contends that multiple firearm enhancements for the use of a single firearm violate double jeopardy. We have repeatedly rejected identical arguments.¹⁴

¹² State v. Shafer, 156 Wn.2d 381, 395, 128 P.3d 87 (2006).

¹³ Gallagher also contends that the trial court erred in admitting Stone's statements as a present sense impression. The State maintains that the statements raise no confrontation clause concerns because they were not hearsay. Because any error was harmless, we do not address these contentions.

¹⁴ See, e.g., State v. Nguyen, 134 Wn. App. 863, 866, 142 P.3d 1117 (2006) (multiple sentence enhancements for crimes committed with weapons do not violate double jeopardy even if use of a weapon is an element of the crime), review denied, 163 Wn.2d 1053, 187 P.3d 752 (2008), cert. denied, ___ U.S. ___, 129 S. Ct. 644,

Gallagher maintains that his double jeopardy claims must be reexamined in light of Blakely v. Washington¹⁵ because the firearm enhancement is essentially an “element” of a greater offense and therefore creates unintended, redundant punishment. Washington courts have rejected this contention as well, noting that because the legislature has provided for exemptions from the firearm enhancement for specific offenses, “[a]ny ‘redundancy’ in mandating enhanced sentences for other offenses involving use of a firearm is intentional.”¹⁶ Blakely provides no support for Gallagher’s double jeopardy arguments.¹⁷

Gallagher next contends that the firearm enhancements for his first degree burglary and first degree robbery convictions violated his right to equal protection. He argues that he is similarly situated to those offenders who are exempt from the enhancement under RCW 9.94A.533(3)(f) because possession or use of a firearm is an element of both his offenses and the exempted crimes and that the classification is therefore arbitrary.

We recently rejected an essentially identical argument in State v. Pedro,¹⁸ in which the defendant challenged the firearm enhancement for his first degree assault conviction. We noted that persons committing the exempt crimes are punished specifically for the use or possession of a firearm: “the use or possession is a

172 L. Ed. 2d 626 (2008)); State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (statute unambiguously establishes legislative intent to impose two enhancements based on a single act of possessing a weapon for eligible offenses).

¹⁵ 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

¹⁶ Nguyen, 134 Wn. App. at 868; see also State v. Kelley, 146 Wn. App. 370, 375, 189 P.3d 853 (2008), review granted, 165 Wn.2d 1027, 203 P.3d 379 (2009).

¹⁷ See Nguyen, 134 Wn. App. at 868; Kelley, 146 Wn. App. at 375.

¹⁸ 148 Wn. App. 932, 201 P.3d 398 (2009).

necessary element of the exempt crimes. Without the use or possession of a firearm, there would be no sentence.”¹⁹ In contrast, use of a firearm is only one way to elevate assault to the first degree, and the sentence for first degree assault remains the same regardless of whether the defendant uses a firearm.²⁰ Consequently, the defendant in Pedro was not similarly situated to those persons who commit the exempt crimes.²¹

The same analysis applies to Gallagher’s convictions for first degree robbery and first degree burglary.²² Because Gallagher is not similarly situated to those who commit crimes for which possession or use of a firearm is a necessary element, his equal protection challenge fails.²³

Relying on Apprendi v. New Jersey,²⁴ Ring v. Arizona,²⁵ and Blakely v. Washington, Gallagher contends that the United States Constitution requires a jury to find beyond a reasonable doubt the existence of prior strike offenses under the POAA. Our Supreme Court has repeatedly rejected this contention.²⁶

Statement of Additional Grounds for Review

Gallagher has filed a statement of additional grounds for review as permitted by RAP 10.10. He first contends that the trial court erred in failing to instruct the jury on the lesser included offense of unlawful display of a weapon for the two assault

¹⁹ Pedro, 148 Wn. App. at 947.

²⁰ Pedro, 148 Wn. App. at 947.

²¹ Pedro, 148 Wn. App. at 947.

²² See RCW 9A.52.020; RCW 9A.56.200.

²³ Pedro, 148 Wn. App. at 947-48.

²⁴ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

²⁵ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

²⁶ See State v. Thiefaul, 160 Wn.2d 409, 418-19, 158 P.3d 580 (2007).

charges. But although the jury found Gallagher guilty on the two assault charges, the sentencing court vacated the convictions, concluding that they merged into the first degree robbery convictions. Gallagher's challenge is therefore moot, and he fails to demonstrate any prejudice resulting from the alleged error.

Gallagher next contends that the trial court erred in failing to order a hearing on his competency to stand trial.²⁷ This contention is premised on Gallagher's claim that his counsel informed the trial court that "I do not think he is competent at this time." But the record demonstrates that defense counsel in fact said "I do think he is competent at this time." Gallagher fails to make any showing that the trial court abused its discretion in failing to order a competency evaluation or that he lacked the capacity to understand the proceedings or assist in his own defense.

In related claims, Gallagher asserts that he was denied effective assistance when defense counsel failed to propose instructions on voluntary intoxication or diminished capacity and failed to pursue the issue of his competency at trial and at the time of the offenses. In order to establish ineffective assistance of counsel, Gallagher must demonstrate both (1) that his attorney's representation fell below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.²⁸

Gallagher maintains that a 2005 pretrial forensic psychological evaluation

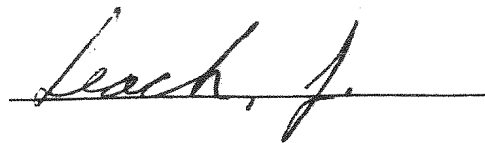
²⁷ See RCW 10.77.060 (court must order mental evaluation whenever there is reason to doubt a defendant's competency).

²⁸ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

demonstrates counsel's deficient performance. But the author of the evaluation expressed "no concern about [Gallagher's] current competence to assist in his own defense" and concluded that "there is not sufficient basis at this point to conclude that he could not form the requisite intents in the alleged offenses." Moreover, it is apparent that many of Gallagher's mental health allegations rest on matters that are outside the record and therefore cannot be addressed in a direct appeal.²⁹ Under the circumstances, Gallagher has failed to demonstrate either deficient performance or resulting prejudice.

Finally, Gallagher alleges that the "to convict" instructions on both first degree robbery counts violated his constitutional right to a unanimous jury verdict. In each case, the trial court instructed the jury on the two charged alternative means of being armed with a deadly weapon or displaying what appeared to be a firearm.³⁰ But "[e]xpress unanimity as to an alternate means of committing a crime is unnecessary if sufficient evidence exists to support each of the alternate means presented to the jury."³¹ Substantial evidence supported each of the robbery alternative means. Gallagher does not allege otherwise and concedes the evidence supporting his convictions was "overwhelming." No unanimity instruction was required.

Affirmed.

A handwritten signature in cursive script, appearing to read "Leach, J.", is written over a horizontal line.

²⁹ See McFarland, 127 Wn.2d at 337-38.

³⁰ See RCW 9A.56.200(1)(a)(i), (ii).

³¹ State v. Howard, 127 Wn. App. 862, 872, 113 P.3d 511 (2005).

WE CONCUR:

Jan, J.

Becker, J.